IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 105 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

KISHORKUMAR VRAJLAL VANPARIYA

Versus

NAGJIBHAI NAJIBHAI VANPARIYA

Appearance:

MR SURESH M SHAH for Petitioner

MR HJ NANAVATI for Respondent No. 1, 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 08/05/98

ORAL JUDGEMENT

1. This appeal is a composite appeal against number of orders passed on various applications by a common disposition. The applications on which the order under appeal pronounces upon are appellant's application for temporary injunction under Order 39, Rule 1 and 2; their application for appointment of receiver pending trial and

for taking proceedings against the respondents for alleged breach of injunction under Order XXXIX, Rule 2A while it was in force.

2. The plaintiff filed a suit in the Court of Civil Judge (S.D.) Junagadh being Special Civil Suit No. 135 of 1997 praying for dissolution of a partnership firm which came into existence between appellant and two respondents vide deed dated 12.1.1995, doing business in the name of Laxmi Steel at Keshod. The first prayer in the suit is to pass a decree for dissolution of the firm, Laxmi Steels, which came into existence vide deed of partnership dated 12.1.1995 and to declare it to be so dissolved, in consequence thereto a decree for accounts of the firm with effect from 12.1.1995 and to restrain defendants from carrying on of business by the respondents by permanent injunction, was also prayed for. Prayer for appointment of receiver to take possession of the accounts and stocks of the firm was also made.

3. In furtherance of the suit, application for temporary injunction as well as appointment of receiver during the pendency of the suit was also made. In the application for temporary injunction it was prayed that defendants be stopped with immediate effect from carrying on with the business of Laxmi Steels and not to enter into any transaction of purchase or sales. Another relief which was claimed was that Nagjibhai be directed to return all goods of Laxmi Steels which he has taken to the premises of their newly started business as Jai Khodiyar Sanitary Stores at Keshod. Another application was also moved under Order XL, Rule 1 for appointment of receiver in respect of the affairs of M/s. Laxmi Steels and to take control of its assets. An ex parte ad interim order was made in favour of the plaintiff, on application, Exh.5, for the breach thereof another application under Order XXXIX, Rule 2A has been made. The principal contention of the plaintiff had been that the partnership in question is a `partnership at will' consisting of three partners and he having given notice under Section 43 of the Indian Partnership Act for dissolving the same, the partnership stood dissolved and he is entitled to reliefs prayed for. The trial court finding in the first instance that this is not a suit for accounts by a partner of a dissolved firm but is for dissolution of the firm. Whether firm is to be dissolved or not is a question that cannot be decided until stage for passing preliminary decree is reached and reliefs claimed in the application at this stage results in allowing the main relief at this stage. Holding the issue of balance of convenience and causing of

irreparable injury also against the plaintiff, it rejected both the applications under Order XXXIX, Rule 1 and 2 and Order XL, Rule 1, and also vacated the ex parte ad interim order passed in favour of the plaintiff. In the process it also rejected the application for taking action against the defendants under Order XXXIX, Rule 2A by a common order dated 23.2.1998. These three orders are in challenge under this appeal.

4. It was at the outset pointed out by the learned counsel for the respondent that appellant has preferred one appeal against three orders deciding three independent applications which is independently giving separate cause for appeal in each case to the appellants and there ought to have been three separate appeals. Learned counsel for the appellant relying on a decision of the Supreme Court in the case of Narhari and Others v. Shanker and Others reported in AIR 1953 SC 419 urged that when common orders are made on separate applications one single appeal is permissible. Having carefully perused that judgment I do not find support for this proposition urged by learned counsel for the appellant. That was a case where in a suit filed by the plaintiff, the trial court passed one decree. Against the decree, two sets of defendants had preferred two separate appeals in which the decree passed by the trial court was set aside and two appellate decrees came into existence by common judgment. Plaintiff preferred two separate appeals before the High Court one of which was barred by limitation. That appeal was rejected. A contention was raised that appeal which was within the limitation ought also to be dismissed as it will be hit by principles of res judicata under Section 11 of the Code of Civil Procedure. The Supreme court rejected the contention that order in one of the appeals filed against two appellate decrees would constitute res judicata. It was in this context it was held that:

> "It was not necessary to file two separate appeals in this case. The question of res judicata arose only when there were two suits. As there was one suit and both the decrees were in the same case and based on the same judgment and the matter decided concerned the entire suit the principle of res judicata did not apply".

The decision no where concerns the question where independent applications under different provisions of the Civil Procedure Code in one suit has been decided, whether one appeal can be filed. Ordinarily when the court provides certain orders to be appealable and makes

independent provision for it, each order gives an independent cause to the aggrieved party to file an appeal and ordinarily he should resort to separate appeals in respect of each order though it may have been passed by the common order. Be that as it may, for the present purposes, learned counsel for the appellant is in agreement, that is, that though the application under Order XXXIX, Rule 1 and 2A is altogether independent and different matter, the appeal must be considered as appeal against the orders on application for temporary injunction under Order XXXIX Rule 1 and 2 and for appointment of receiver under Order XL, Rule 1 and he may be permitted to file a separate appeal in respect of Order XXXIX, Rule 2A. He is permitted to do so.

5. In the first instance, it has been urged by learned counsel for the appellant that the trial court has erred in considering the suit for a decree for dissolution of the firm. In fact it is a suit for declaration that the firm is dissolved and the suit for accounts for the dissolved firm. As the lower court has examined the entire issue on wrong assumption about the nature of suit, the order under appeal is vitiated.

6. Having carefully examined the contention and perused the plaint as well as the applications I am of the opinion that this contention of the learned counsel for the appellant is not well founded. As noticed above, the first relief in the plaint itself is that a decree for dissolution of the firm may be passed which came into existence on 12.1.1995. In his application for receiver also, the plaintiff has unequivocally averred that there exists between plaintiffs and defendants a partnership firm named as Laxmi Steels at Keshod and suit is for its dissolution. Therefore the trial court has not committed any error in examining the issue by treating the suit as a suit seeking decree for dissolution of the firm. If that be so the trial court was right in its conclusion that the stage for considering the reliefs seeking dissolution of the firm would arise only when stage for making a preliminary decree for dissolution of the firm is reached. Until then, the existing firm cannot be stopped from carrying on with its business. Examined from that point of view, the conclusion of the trial court about balance of convenience as well as finding that no irreparable injury will be caused if the injunction prayed for by the plaintiff is not granted cannot be said to be erroneous. Admittedly, the firm consists of three partners. Plaintiff is desirous of getting the decree for dissolution of the firm whereas other two partners are willing to carry on with the

business. Unless the firm is dissolved it cannot be said that the balance of convenience lies in favour of the closing down the business of the firm at the threshold of filing of the suit by way of temporary injunction, or its affairs be handed over to receiver.

7. It was then urged by the learned counsel for the appellant that the trial court has failed to appreciate that partnership in question is a partnership at will. The plaintiff has served a notice as required under section 43 of the Partnership Act, legal effect of which is that the firm stood dissolved on the expiry of period of notice and taking that view of the mater, the consequence of a dissolved firm must legally follow, namely, the remaining partners must be stopped from carrying on the activities of the business in the firm name and in case there is dissolution, the receiver ought to have been appointed.

Learned counsel for the respondent on the other hand disputes the assertion that the partnership is a partnership at will. Both the learned counsel relied on clause (4) of the deed, which is reproduced hereinbelow:

(Gujarati version)

8. Coupled with this, learned counsel for respondent also relies on clause 17 of the deed which permits one of the partners to retire from the firm.

9. In reply learned counsel for the appellant urges that clause 17 is independent and is mere statement of law as contained in Section 32(1)(c) of the Partnership Act permitting a partner to retire where the partnership is at will and both the clauses, namely, the `Partnership at will' is liable to be dissolved at the option of one of the partners and right of a partner to retire from the firm without dissolving it are independent rights of the partners and can simultaneously exist.

10. Having carefully considered the rival contentions, and considering the terms of partnership, prima facie, I am of the view that clause (4), reads that the firm shall continue to exist until it is dissolved by consent of each other meaning thereby by `mutual agreement' or in any manner permissible under law and in

this context the last sentence is to be read which says that, that is to say, the partnership is at will of the partners. Prima facie read as a whole this clause gives a clue that partnership would continue to exist unless partners mutually decides to dissolve it or it is liable to be dissolved in any other manner. It may be noticed that Section 40 envisages that a firm may be dissolved with the consent of all the partners or in accordance with the contract between the parties. Section 41 provides for compulsory dissolution spelling out the circumstances under which the firm is to be compulsorily dissolved, namely, when all, or all but one partners are adjudicated involvement or by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership. Section 42 further envisages the contingencies in which subject to contract between the partners a firm is dissolved, viz, (i) if constituted for a fixed term, by the expiry of that term; (ii) if constituted to carry out one or more adventures or undertakings, by the completion thereof; (iii) by the death of a partner and (iv) by the adjudication of a partner as an insolvent.

11. Under clause (4) the partners definitely envisage that firm should be dissolved either by mutual agreement of the partners as envisaged under Section 40 or in any other modes which are applicable to the firm referrable to Sections 41 and 42(c) in the contingencies which may be applicable to it. For instance while under section 42(c) the death of a partner results in dissolution of a firm, but under clause 16 of the partnership deed, the parties have agreed that on death of a partner, the remaining partners shall continue to carry on the business. However there is no agreement contrary to section 42(d) namely dissolution of the firm or adjudication of a partner as an insolvent. While the provisions of Section 41 are not subject to the contract to agreement, Section 40 and 42 are subject to such agreement, Thus clause 4 read with clause 17 is more in consonance with Section 40, 41 and 42 than with Section 7.

12. Section 7 which defines partnership at will envisages two contingencies in the presence of either of which a firm cannot be said to be a partnership at will. It reads:

> "Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their

partnership, the partnership is `partnership at will'."

13. Prima facie no period of partnership business has been fixed in the agreement. However, mode of determination of the Partnership is envisaged as `until the partners mutually decides to dissolve it'. That is an agreement in terms of section 40 of the Act, in the presence of which Section 7 would not apply. Section 43 merely provides a mode of dissolution in case it is a partnership at will but does not operate by itself merely because one of the partner considering partnership to be a `partnership at will' gives a notice envisaged under Section 43. At any rate, whether it is a partnership at will or is governed by Section 40 will have to be decided by the court when a question is raised.

14. As prima facie I am of the opinion, that clause 4 of the deed is in consonance with Section 40 and not in consonance with Section 7 I am not examining further question what is the effect of clause 17 on the issue.

15. As I have come to the conclusion that the plaintiffs have not been able to establish prima facie case for treating the partnership at will at this stage the contention founded on the status of the firm as a partnership at will cannot be accepted and the interim reliefs founded on that premise also cannot be granted.

16. In view of the aforesaid, I am of the opinion, that the trial court was right in rejecting both the applications, namely for grant of temporary injunction as well as for appointing a receiver during pendency of the suit until the stage for passing the preliminary decree for dissolution of the firm is reached.

17. The appeal therefore fails and is hereby dismissed. There shall be no orders as to costs.

Civil Application is dismissed.

(Rajesh Balia, J)